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The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform

Annemarie Bridy

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The Price of Closing the “Value Gap”: How the Music Industry Hacked EU Copyright Reform

*Annemarie Bridy**

ABSTRACT

Sweeping changes are coming to copyright law in the European Union. Following four years of negotiations, the European Parliament in April 2019 approved the final text of the Digital Single Market (DSM) Directive. The new directive contains provisions for enhancing cross-border access to content available through digital subscription services, enabling new uses of copyrighted works for education and research, and, most controversially, “clarifying” the role of online services in the distribution of copyrighted works.

Article 17 of the DSM Directive is directed to the last of these goals. It was designed to address the so-called value gap—the music industry’s longstanding complaint that YouTube underpays music rights holders for streams of user-uploaded videos containing claimed copyrighted content. The text of the DSM Directive nowhere mentions YouTube, but anyone versed in the political economy of digital copyright knows that Article 17 was designed specifically to make YouTube pay. The important question in the wake of Article 17’s adoption is who else will pay—and in what ways.

* Allan G. Shepard Professor of Law, University of Idaho College of Law; Affiliate Scholar, Stanford Center for Internet and Society; Affiliated Fellow, Yale Information Society Project. Different iterations of this Article were presented at the 2019 Internet Law Works in Progress Conference at Santa Clara Law; the *Loyola Chicago International Law Review* 2019 Symposium, “Regulating Internet Content in the United States and Europe: A Comparative Approach”; the *Vanderbilt Journal of Entertainment & Technology Law* 2019 Symposium, “Regulating the Unregulatable: Perspectives on Governance of Technological Advancements”; and IPSC 2019. The Author would like to thank the student organizers of both symposia; the diligent, patient editors at JETLaw; and the many colleagues who provided valuable feedback as the project took shape. After this Article was submitted for publication, the Author joined the in-house legal team at Google. The views expressed herein are the Author’s personal views and should in no way be attributed to Google. No part of this project was funded directly or indirectly by Google, Alphabet, or any related entity.

This Article offers a focused examination of Article 17 as a public law created to settle a private score between the music industry and YouTube. Part II explains and critiques the “value gap” as a policy rationale for altering the scope of copyright safe harbors. Part III breaks down the terms of the European Commission’s original proposal for Article 13 (which later became Article 17) in relation to existing provisions of the E-Commerce Directive and the Information Society Directive. Part IV surveys human rights-related and competition-related criticisms of the Commission’s proposal. Part V analyzes the adopted text of Article 17 with attention to the nature and adequacy of revisions made to answer the criticisms outlined in Part IV.

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I. INTRODUCTION

Sweeping changes are coming to copyright law in the European Union. Following four years of negotiations, the European Parliament in April 2019 approved the final text of the Digital Single Market (DSM) Directive.¹ EU member states now have two years to transpose its provisions into domestic law.² The new directive, which is the most substantial change to EU copyright law in a generation, contains provisions for enhancing cross-border access to content available through digital subscription services, enabling new uses of copyrighted works for education and research, and, most controversially, “clarifying” the role of online services in the distribution of copyrighted works.³

Article 17 of the DSM Directive, a provision associated with the last of these goals, is intended to address the so-called value gap—the music industry’s longstanding complaint that YouTube undercompensates music rights holders for streams of user-uploaded videos containing claimed copyrighted content.⁴ The text of the DSM Directive nowhere mentions YouTube, but anyone versed in the political economy of digital copyright knows that Article 17 was designed specifically to make YouTube pay. The important question in the wake of Article 17’s adoption is who else will pay—and in what ways.

This Article offers a focused examination of Article 17 as a public law created to settle a private score between the music industry and YouTube. Part II explains and critiques the “value gap” as a policy rationale for altering the scope of generally applicable copyright safe harbors. Part III breaks down the terms of the European Commission’s original proposal for DSM Directive Article 13, which later became Article 17, in relation to existing provisions of the E-Commerce Directive (ECD)⁵ and the Information Society (InfoSoc) Directive.⁶ Part IV surveys criticisms of Article 13’s mass licensing and technical measures mandates related to fundamental rights and competition. Part V analyzes the adopted text of Article 17 with attention to the

1. Council Directive 2019/790, 2019 O.J. (L 130) (EU) [hereinafter “DSM Directive”].

2. *See id.* at 125 (art. 29) (providing that transposition by Member States must occur by June 7, 2021).

3. *See id.* at 92 (recital 3) (summarizing the Directive’s key provisions).

4. *See id.* at 119 (art. 17) (governing “use of protected content by online content-sharing service providers”).

5. Council Directive 2000/31, 2000 O.J. (L 178) (EC) [hereinafter “ECD”].

6. Council Directive 2001/29, 2001 O.J. (L 167) (EC) [hereinafter “InfoSoc Directive”].

nature and adequacy of the revisions that were made to answer the criticisms outlined in Part IV.

II. SAFE HARBORS, YOUTUBE, AND THE “VALUE GAP”

The policy rationale for Article 17 comes directly from a music industry lobbying campaign that began around 2015.⁷ The “value gap” is a slogan that music industry trade groups created to sell policy makers on the idea that copyright safe harbors are not a sound policy choice for the whole internet but a legal loophole that allows YouTube to unfairly exploit the music industry’s valuable intellectual property.⁸ According to the International Federation of the Phonographic Industry (IFPI) and other industry groups, safe harbors create a value gap between what content-sharing services like YouTube pay per stream of copyrighted music and what dedicated music streaming services like Spotify pay.⁹ The fact that copyright law treats YouTube and Spotify differently, they argue, distorts the digital music marketplace by suppressing streaming royalty rates across the board.¹⁰

The upshot of the value gap as a copyright policy proposition is that music industry stakeholders want more money from YouTube, and they want to reshape the law to get it. Simply put, they seek to redefine the scope of existing copyright safe harbors in the European Union and the United States to exclude YouTube from their protection. The

7. See, e.g., INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2015 22–23 (2015), <https://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf> [<https://perma.cc/N5C3-HQNL>] [hereinafter IFPI]; Recording Indus. Ass’n of Am. et al., *Joint Comments of the “Music Community”*, U.S. Copyright Office Section 512 Study, Docket No. 2015-7, Appendix C, 5–6 (Mar. 31, 2016), <https://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf> [<https://perma.cc/JJ8Z-XM87>]; Recording Indus. Ass’n of Am., *Five Stubborn Truths About the Value Gap*, MEDIUM (Aug. 18, 2017), <https://www.riaa.com/medium-five-stubborn-truths-youtube-value-gap/> [<https://perma.cc/F9B8-VCLM>]; Recording Indus. Ass’n of Am. & Nat’l Music Publishers’ Ass’n, *Comments in Response to Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement 4* (Nov. 13, 2018), https://torrentfreak.com/images/RIAA-IPEC_strategic_plan_submission_v11-13-18.pdf [<https://perma.cc/4WGR-Y9TW>] [hereinafter RIAA & Nat’l Music Publishers’ Ass’n]. In the European Commission’s public information campaign for the DSM Directive, the Commission routinely described Article 13/17 as a solution for the “value gap” without ever attributing the term to music industry lobbyists. See, e.g., Press Release, European Comm’n, Questions & Answers: EU Negotiators Reach a Breakthrough to Modernise Copyright Rules (Feb. 13, 2019), http://europa.eu/rapid/press-release_MEMO-19-1151_en.htm [<https://perma.cc/5TCD-EMU9>]; Press Release, European Comm’n, Speech by Vice-President Ansip on Copyright at the Charles Clark Memorial Lecture, London Book Fair (Apr. 10, 2018), http://europa.eu/rapid/press-release_SPEECH-18-3124_en.htm [<https://perma.cc/VL5G-ANJJ>].

8. See IFPI, *supra* note 7, at 22–23 (explaining the “value gap”).

9. *Id.* at 23.

10. *Id.*

predicted effect of such a change is to force YouTube to renegotiate its existing licenses with record labels and music publishers on terms more favorable to the music industry. As explained in the pages that follow, both the European Commission (the “Commission”) and the European Parliament embraced this solution, with potentially damaging collateral consequences for the open internet, the expressive rights of internet users, and the vast array of content-sharing businesses that allow internet users to take part in the digital economy and digital culture.

A. *An Apples-to-Oranges Comparison*

A major flaw in the logic of the value gap, albeit not one that troubled the Commission, is that the music industry’s asserted equivalence between dedicated music streaming services like Spotify and user-generated content (UGC) services like YouTube is false. Not only is it false, it is false in a way that intentionally elides the policy rationale for safe harbors. Safe harbors exist to limit liability and provide certainty for online businesses that allow members of the public to create and share content. They make it possible for the public to access open online forums for creative expression and cultural participation.¹¹ Without them, such forums cannot manage the operating risk inherent in hosting massive quantities of third-party content.

Because Spotify and YouTube operate under different business models, they don’t face the same legal risks. Spotify is a closed distribution platform; it directly chooses and controls the whole universe of content it makes available to subscribers. It therefore knows exactly what content will be available on its service at any given time. No random subscriber in Paris—France or Texas—can upload a cat video to Spotify at three o’clock in the morning on a Sunday. YouTube, by contrast, is open to all comers all the time.

Open services like YouTube face uncertain and continuous exposure to legal claims arising from their users’ activity, including copyright infringement. Safe harbors were created because policy makers knew that infringement is inevitable on open, public-facing platforms. Closed services like Spotify don’t enjoy the protection of safe harbors, not because they are being treated unfairly but because they

11. Cf. Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 518 (2017) (“The openness of internet platforms has been a powerful democratizing force in cultural production. The lack of central planning and prior restraint leaves [amateur creators] to compete for attention on equal terms with more traditional entertainment industry offerings.”).

don't need it. Considering the nature of the services in question, the comparison at the heart of the value gap campaign is inapt.

Legal exposure arising from copyright-infringing UGC is profound for any US-based service operating at internet scale, because US copyright law permits recovery of statutory damages of up to \$150,000 per infringed work.¹² To give a concrete example of how quickly those damages can add up, Viacom claimed over a billion dollars in statutory damages when it sued YouTube—then still a startup—in 2007.¹³ Copyright safe harbors exist so that online businesses hosting UGC can raise capital and operate. Without them, UGC-based online business models would be unsustainable for all but megaservices like YouTube and Facebook, which have accrued sufficient wealth to withstand eight-figure legal judgments and the cost of taking whatever measures are necessary to avoid them.

As the dominance of YouTube and Facebook draws increased regulatory scrutiny, it is important to remember that intermediary safe harbors do not just benefit the internet's platform giants. Safe harbors are essential to the internet's interactive architecture. They are indispensable for the wide swath of service providers that keep the internet's application layer diverse, offering the public opportunities for creativity and conversation beyond the confines of the major platforms. The danger of the value gap campaign from a policy perspective is its narrow focus on the impact of a particular service, YouTube, on a particular industry, recorded music.

B. The ECD's Article 14 Storage Safe Harbor

The safe harbor in the crosshairs of the value gap campaign is the storage safe harbor in ECD Article 14.¹⁴ ECD Article 14 conditions safe harbor for storage providers on their not having knowledge of infringement and on their removing or disabling access to infringing content when they learn about it, whether through notice from a rights holder or otherwise.¹⁵ ECD Article 14 also conditions safe harbor on a provider's not having control over its users' illegal activities.¹⁶ A

12. See 17 U.S.C. § 504 (providing for statutory damages of up to \$150,000 per work in cases of willful infringement).

13. Jonathan Stempel, *Google, Viacom Settle Landmark YouTube Lawsuit*, REUTERS (Mar. 18, 2014), <https://www.reuters.com/article/us-google-viacom-lawsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318> [<https://perma.cc/2Y94-3VV2>]. Google acquired YouTube for \$1.65 billion in 2006. *Id.*

14. ECD, *supra* note 5, at 13 (art. 14).

15. *Id.*

16. *Id.*

provider's knowledge of infringement can be based on notice or, alternatively, on facts and circumstances from which infringing activity is apparent.¹⁷ The copyright enforcement framework embodied in ECD Article 14 is reactive; acquiring knowledge of a particular infringement serves as a trigger for action on the provider's part.¹⁸ As a general matter, actionable knowledge comes from notices, and notices come from rights holders.

The ECD's reactive notice-and-takedown framework puts the burden of monitoring for infringement on rights holders. Accordingly, ECD Article 15 provides that member states cannot condition safe harbor for any eligible service provider on a "general monitoring obligation."¹⁹ ECD Article 15 would thus seem to prevent member states from requiring service providers to use technical measures—e.g., automated content recognition (ACR) systems like YouTube's Content ID—to continuously monitor all of the content their users upload, with an eye to preventing infringements.

At the same time, however, ECD Article 14 provides that a rights holder may seek an injunction, as permitted by national law, "requiring the service provider to terminate *or prevent* an infringement."²⁰ Whereas *terminating* an infringement is consistent with a solely reactive posture on the part of a service provider, *preventing* an infringement is not and would appear to entail active and ongoing monitoring for infringing content. It is thus challenging to reconcile the availability of preventive injunctions under ECD Article 14 with the prohibition on general monitoring obligations in ECD Article 15.²¹ As discussed in Section III.B below, courts in the European Union have grappled with this tension for years.

17. *Id.*

18. See generally Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 COLUM. J.L. & ARTS 53 (2018) (providing a taxonomy of enforcement models and explaining notice-and-takedown procedures under the ECD and the Digital Millennium Copyright Act).

19. ECD, *supra* note 5, at 13 (art. 15).

20. *Id.* at 13 (art. 14) (emphasis added).

21. As part of the DSM Platform Consultation, the Commission sponsored a report on intermediary liability. Its authors concluded that the scope of ECD Articles 14 and 15 requires clarification as applied to today's services, which have features and architectures that did not exist when the ECD was adopted. See JORIS VAN HOBOKEN ET AL., HOSTING INTERMEDIARY SERVICES AND ILLEGAL CONTENT ONLINE: AN ANALYSIS OF THE SCOPE OF ARTICLE 14 ECD IN LIGHT OF DEVELOPMENTS IN THE ONLINE SERVICE LANDSCAPE, REPORT FOR THE EUROPEAN COMMISSION DG COMMUNICATIONS NETWORKS, CONTENT & TECHNOLOGY 6, 46 (2018).

C. How Content ID Changed the Game

In 2007, when YouTube introduced Content ID, notice-and-takedown was the settled legal framework within which YouTube and rights holders operated when it came to policing copyrights. Because YouTube had no legal obligation to monitor user uploads for infringing content, it made Content ID available to selected corporate partners on terms of its own choosing.²²

Content ID works by creating a unique digital fingerprint of every uploaded user file and then using that fingerprint to query a database populated with fingerprints of reference files provided by rights holders.²³ If any portion of an uploaded file matches content in a reference file, the user's upload is automatically claimed for the rights holder who submitted the reference file.²⁴ The rights holder elects when submitting individual reference files whether they want to monetize or block algorithmically claimed user uploads.²⁵ For claimed videos the rights holder elects to monetize, the uploader's share of ad revenue from views of the video is diverted to the rights holder.²⁶ For claimed videos the rights holder elects to block, no revenue is generated for anyone.

Content ID offers participating rights holders two major benefits over notice-and-takedown: (1) it continuously monitors YouTube uploads for rights holders' copyright-protected content, thereby relieving them of the hassle of sending bulk notices; and (2) it enables them to authorize and monetize user infringements instead of blocking them.²⁷ With Content ID, YouTube created an entirely new revenue stream for rights holders: automated, real-time licensing of initially unauthorized amateur uses of copyrighted content. Before Content ID,

22. See Brad Stone & Miguel Helft, *New Weapon in the Web War over Piracy*, N.Y. TIMES (Feb. 19, 2007), <https://www.nytimes.com/2007/02/19/technology/19video.html> [<https://perma.cc/N4WU-765D>] (reporting on media companies' negative reaction to YouTube's conditioning access to Content ID on the execution of broader licensing agreements).

23. See YouTube Creators, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010), <http://youtube.com/watch?v=9g2U12SsRns> [<https://perma.cc/8L2G-DEGL>]; see also Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools*, ENGINE 13–14 (Mar. 2017), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf> [<https://perma.cc/2PAZ-UVTW>] (explaining the acoustical fingerprinting technology that underlies Content ID).

24. See YouTube Creators, *supra* note 23.

25. *Id.*

26. *Id.*

27. Google, Inc., *How Google Fights Piracy*, GOOGLE 24–25 (Nov. 2018), https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/How_Google_Fights_Piracy_2018.pdf [<https://perma.cc/BBW4-JL46>]. Over 90 percent of claimed videos in Content ID are monetized rather than blocked. *Id.* at 14.

there was no practical, scalable way for rights holders to track, claim, and monetize users' infringements on YouTube. Takedown was the only game in town, and it earned rights holders nothing. Content ID revealed the utility of ACR technology not just for blocking unauthorized uses of copyrighted works but for licensing them at scale. It should thus come as no surprise that ACR—a “technical measure”—is integral to the music industry's desired policy solution to the value gap.

To get access to Content ID and the new market it unlocked, the major record labels and music publishers agreed to license their catalogs to YouTube in return for undisclosed compensation, including a cut of ad revenue from claimed, monetized videos.²⁸ A lesser-known fact is that the major labels also negotiated for equity stakes in YouTube that were reportedly valued at up to \$50 million.²⁹ In addition, the industry derives other value from YouTube. Not only do rights holders monetize claimed content in user-uploaded videos, they operate and monetize official YouTube channels for their own artists.³⁰ Some of them are among the platform's most popular.³¹ Rights holders also use YouTube to find and recruit new talent, including superstars like Justin Bieber, Carly Rae Jepsen, Shawn Mendes, Alessia Cara, and the Weeknd.³² It is unclear how, if at all, the benefits of talent promotion and discovery figure into the industry's value gap accounting.

Over time, the music industry's relationship with YouTube has been lucrative. From October 2017 to September 2018, YouTube reported that it paid more than \$1.8 billion in ad revenue to music industry partners.³³ From the music industry's viewpoint, however, the deal is not lucrative enough.³⁴ The IFPI claims in its value gap talking points that for every twenty dollars Spotify returns to the music

28. Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, N.Y. TIMES (Oct. 19, 2006), <https://www.nytimes.com/2006/10/19/technology/19net.html> [<https://perma.cc/6VR9-74RK>].

29. *Id.*

30. See Todd Spangler, *YouTube Will Merge Vevo Channel Subscribers into Unified 'Official' Music Artist Accounts*, VARIETY (Jan. 23, 2018, 12:27 PM), <https://variety.com/2018/digital/news/youtube-vevo-music-channels-consolidation-official-artists-1202674125/> [<https://perma.cc/DM9P-GSHE>] (reporting on YouTube's consolidation of Vevo artist channels and unofficial artist channels into Official Artist Channels).

31. *Id.*

32. See Isis Briones, *12 Major Artists Who Got Their Start on YouTube*, TEEN VOGUE (Mar. 29, 2016), <https://www.teenvogue.com/story/best-artists-discovered-on-youtube> [<https://perma.cc/AK5A-PKSC>].

33. See Google, Inc., *supra* note 27, at 21.

34. See, e.g., RIAA & Nat'l Music Publishers' Ass'n, *supra* note 7, at 4 (asserting that YouTube licenses content “at a fraction of market value”).

industry, YouTube returns only a dollar.³⁵ Neither side's claims about who pays what to whom are verifiable. It is indisputable, however, that the music industry's annual revenues have been increasing dramatically—with copyright safe harbors fully intact—since its trade associations began messaging about the value gap.³⁶ In 2018, the Recording Industry Association of America (RIAA) reported that sound-recording revenues rose 12 percent to \$9.8 billion, reaching their highest level in ten years.³⁷ Streaming revenues grew by 30 percent.³⁸ The National Music Publishers Association (NMPA) reported that music-publishing revenues rose to \$3.3 billion, an increase of 11.8 percent over the previous year.³⁹ In short, the industry has rebounded from the hit it took during the Napster years, and streaming has been the game changer.⁴⁰

D. What the Music Industry Wanted (and Got)

Rights holders have long argued that YouTube should be legally required to give them access to Content ID with no strings attached.⁴¹ Viacom made precisely that argument when it sued YouTube in the United States in 2007, but the court saw no legal basis for it. Citing section 512(m) of the Digital Millennium Copyright Act (DMCA), which

35. Roy Trakin, *IFPI Report Finds Streaming Continues to Rise, YouTube Dominates Online Listening*, VARIETY (Oct. 9, 2018, 11:39 AM), <https://variety.com/2018/music/news/ifpi-report-streaming-youtube-online-listening-1202974035/> [<https://perma.cc/L58M-HVK>].

36. See Joshua P. Friedlander, *News and Notes on 2015 RIAA Shipment and Revenue Statistics*, RECORDING INDUS. ASS'N AM. (2015), <https://www.riaa.com/wp-content/uploads/2016/03/RIAA-2015-Year-End-shipments-memo.pdf> [<https://perma.cc/HPJ7-SS7G>]. According to the RIAA, “2015 was a milestone year for streaming music.” *Id.* For 2015, the RIAA reported \$2.4 billion in total streaming revenue, offsetting combined losses that year from sales of digital downloads and physical formats. *Id.* Of that total, \$1.2 billion came from paid streaming subscriptions, up 52 percent from 2014. *Id.* \$385 million came from ad-supported streaming, up from \$295 million in 2014. *Id.*

37. Jem Aswad, *U.S. Music Industry Posts Third Straight Year of Double-Digit Growth as Streaming Soars 30%*, VARIETY (Feb. 28, 2019, 10:55 AM), <https://variety.com/2019/biz/news/u-s-music-industry-posts-third-straight-year-of-double-digit-growth-as-streaming-soars-30-1203152036/> [<https://perma.cc/3AU3-L4GP>].

38. *Id.*

39. Ed Christman, *NMPA Announces 11.8% Member Revenue Growth to \$3.3B at Annual Meeting*, BILLBOARD (June 12, 2019), <https://www.billboard.com/articles/business/8515757/nmpa-member-revenue-growth-david-israelite-annual-meeting> [<https://perma.cc/DQ4D-JWY7>].

40. Sam Wolfson, *We've Got More Money Swirling Around: How Streaming Saved the Music Industry*, GUARDIAN (Apr. 24, 2018, 5:00 PM), <https://www.theguardian.com/music/2018/apr/24/weve-got-more-money-swirling-around-how-streaming-saved-the-music-industry> [<https://perma.cc/Q2TZ-6B3M>].

41. See Stone & Helft, *supra* note 22 (reporting on media companies' demands that YouTube implement audiovisual fingerprinting technology).

is the US equivalent of ECD Article 15, the court held that YouTube could not be denied safe harbor under section 512(c)—the equivalent of ECD Article 14—for “refusing to provide access to mechanisms by which [it] affirmatively monitors its own network.”⁴²

Because safe harbors have not historically been conditioned on providers’ giving rights holders free access to the technology they use to monitor content on their services, rights holders have had to negotiate for access. The alternative has been notice-and-takedown, which is cumbersome and leaves a lot of money (i.e., ad revenue) on the table. Because YouTube has had no legal duty to monitor for infringement, it has been able to use Content ID as a bargaining chip in licensing negotiations with music rights holders. Rights holders want policy makers in both the European Union and the United States to take that bargaining chip away, thereby—they believe—dramatically raising licensing rates and closing the value gap. To that end, rights holders have advocated narrowing the ECD and DMCA storage safe harbors and requiring all UGC-sharing services to use ACR technology as a copyright management tool for their benefit.

Despite the false equivalence at the heart of the value gap campaign, the European Commission was persuaded that YouTube’s entitlement to the protection of the ECD storage safe harbor has not been conducive to “a fair sharing of value”⁴³ for use of recorded music on the platform. In its proposal to Parliament, the Commission was frank about the intended redistributive effects of Article 13:

By improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right This positive impact will be reinforced by the measures to improve licensing practices, and ultimately rightholders’ revenues.⁴⁴

To accomplish its redistributive goal—a wealth transfer from YouTube to music industry stakeholders—the Commission proposed Article 13.

III. ARTICLE 13: THE COMMISSION’S ORIGINAL PROPOSAL

In the Commission’s September 2016 proposal, Article 13 swept broadly, covering all “information society service providers storing and giving access to large amounts of works and other subject-matter

42. 17 U.S.C. § 512 (2018); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 40–41 (2d Cir. 2012); ECD, *supra* note 5, at 13 (art. 14–15).

43. Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, at 3, COM (2016) 593 final (Sept. 14, 2016) [hereinafter “DSM Directive Proposal”].

44. *Id.* at 9.

uploaded by their users.”⁴⁵ All such providers were to “take measures to ensure the functioning of [licensing] agreements concluded with rightholders . . . or to prevent the availability on their services of works or other subject-matter identified by rightholders through cooperation with service providers.”⁴⁶

The recitals to the original Article 13 summarized the provision as embodying two requirements: (1) a plenary licensing requirement for any provider falling outside the scope of the ECD’s Article 14 storage safe harbor, and (2) an infringement-prevention (or blocking) requirement applicable to all providers—even those eligible for the ECD Article 14 safe harbor.⁴⁷ Positioning Article 13 as the policy solution to the value gap, the Commission implicitly targeted YouTube, contemplating that it and other covered providers would use technical measures (e.g., Content ID) to recognize copyrighted content in user uploads and then monetize or block the videos containing that content, according to the relevant rights holder’s predetermined preference.

This Part unpacks Article 13’s original licensing and technical measures requirements and explains how they fit with existing provisions of the ECD and the InfoSoc Directive, as the Court of Justice for the European Union (CJEU) has interpreted those provisions.

A. *The Licensing Requirement*

The licensing requirement in Article 13 exempted any provider eligible for the ECD’s Article 14 storage safe harbor, which covers service providers that engage in “storage of information provided by a recipient of the service . . . at the request of [the] recipient.”⁴⁸ The CJEU has not yet decided whether YouTube is eligible for safe harbor under ECD Article 14. US courts, however, have concluded in multiple cases that video-sharing services, including YouTube, are eligible for the DMCA’s section 512(c) storage safe harbor.⁴⁹

Rights holders believe that YouTube should be ineligible for safe harbor because playback and other core functions of the service (i.e., search and recommendations) are “active” and therefore fall outside the limited definition of “storage” in ECD Article 14, which they would limit

45. *Id.* at 29 (art. 13).

46. *Id.*

47. *Id.* at 20 (recital 38).

48. ECD, *supra* note 5, at 13 (art. 14).

49. *See* Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 99 (2d Cir. 2016); UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006, 1036 (9th Cir. 2013); Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2d Cir. 2012).

to purely “passive” or neutral functions.⁵⁰ They also argue that YouTube’s video playback functionality—the service’s defining feature—constitutes “communication to the public” within the meaning of Article 3(1) of the InfoSoc Directive and therefore requires a license from rights holders.⁵¹ These issues are now pending before the CJEU in two cases: *LF v. Google*, the November 2018 referral of a German case captioned *Peterson v. YouTube*, and *Puls 4 TV v. YouTube*, a July 2019 referral from the high court of Austria.⁵²

In its original proposal for Article 13, the Commission embraced rights holders’ views on both ECD Article 14 and InfoSoc Directive Article 3(1). With respect to the scope of ECD Article 14, the Commission wrote that eligibility hinges on “whether the service provider plays an active role, including by optimizing the presentation of the uploaded works . . . or promoting them.”⁵³ With respect to the scope of InfoSoc Directive Article 3(1), the proposal stated that services providing public access to copyrighted works “[go] beyond the mere provision of physical facilities and [perform] an act of communication to the public.”⁵⁴ All such services, the Commission announced, must license the works their users stream or be liable for infringement.⁵⁵

The remainder of this Section considers the extent to which the Commission’s perspectives on ECD Article 14 and InfoSoc Directive Article 3(1) accurately restate or “clarify” existing CJEU case law, as the Commission claimed in its proposal.

50. See IFPI, *supra* note 7, at 5 (“Laws that were designed to exempt passive hosting companies from liability in the early days of the internet—so-called ‘safe harbours’—should never be allowed to exempt active digital music services from having to fairly negotiate licences with rightholders.”). This argument has repeatedly failed in the United States as applied to the storage safe harbor in section 512(c) of the DMCA. See, e.g., *Viacom*, 676 F.3d at 39. US courts have held specifically that YouTube’s playback, search, and recommendation functions do not disqualify it from safe harbor. See *id.* (holding that “safe harbor extends to software functions performed for the purpose of facilitating access to user-stored material” and that limiting safe harbor to purely “passive” functions “would eviscerate the protection afforded to service providers by § 512(c)”).

51. See Joint Statement from IFPI et al., *Joint Statement on Transfer of Value—Value Gap*, to Axel Voss, Member of the European Parliament (Oct. 11, 2017), https://www.ifpi.org/downloads/ValueGap_Joint_Statement_04102017.pdf [<https://perma.cc/9C7M-RJR6>] (urging EU policy makers to adopt the position that platforms providing users with access to copyrighted works engage in communication to the public).

52. Case C-682/18, *LF v. Google*, LLC, 2018 E.C.R., ¶¶ 1–2; Case C-500/19, *Puls 4 TV GmbH & Co. KG v. YouTube LLC*, 2019 E.C.R., ¶¶ 1–4.

53. DSM Directive Proposal, *supra* note 43, at 20 (recital 38).

54. *Id.*

55. *Id.*

1. ECD Article 14 in the CJEU

The CJEU's case law on the scope of ECD Article 14 is somewhat mixed. As Jaani Riordan points out, “[t]he dividing line that separates protected acts of storage from unprotected acts of intervening in content can be difficult to discern.”⁵⁶ Two trademark cases support the Commission's narrow reading, but a more directly analogous (and roughly contemporaneous) copyright case doesn't. The trademark cases are *Google France v. Louis Vuitton*⁵⁷ and *L'Oréal v. eBay*,⁵⁸ both involving claims of infringement by means of Google's AdWords program. The copyright case is *SABAM v. Netlog*,⁵⁹ in which a Belgian collecting society for music rights holders sued a now-defunct social media service.

In *Google France*, the CJEU considered whether Google could claim the storage safe harbor with respect to AdWords, which lets advertisers run ads against Google Search results for selected keywords in user search queries. Louis Vuitton sued Google over the use of Louis Vuitton's trademarks as keywords.⁶⁰ The CJEU interpreted ECD Article 14 eligibility to depend on “whether the role played by th[e] service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”⁶¹ The court held that setting payment terms, providing information to users, and displaying ads triggered by search terms corresponding to user-selected keywords were sufficiently “passive” and automatic to fall within the scope of the safe harbor.⁶² By contrast, it held, drafting content for ads and selecting keywords for advertisers were too “active.”⁶³

In *L'Oréal*, the CJEU again applied an active-passive test to determine the applicability of ECD Article 14. *L'Oréal* sued eBay for using its trademarks as keywords in AdWords, resulting in the display of sponsored links to eBay listings alongside search results for *L'Oréal*'s branded products.⁶⁴ The CJEU again held that eligibility for ECD Article 14 turns on the nature of the defendant's relationship to user content. Article 14 does not apply “where the service provider, instead

56. JAANI RIORDAN, THE LIABILITY OF INTERNET INTERMEDIARIES 401 (2016).
57. Case C-236/08, *Google Fr. v. Louis Vuitton Malletier*, 2009 E.C.R. 159.
58. Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, 2010 E.C.R. 474.
59. Case C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85.
60. *Google Fr.*, 2009 E.C.R. 159, ¶ 37.
61. *Id.* ¶ 114.
62. *Id.* ¶ 116.
63. *Id.* ¶ 118.
64. Case C-324/09, *L'Oréal SA v. eBay Int'l AG*, 2010 E.C.R. 474, ¶¶ 38–39.

of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data.”⁶⁵ Analyzing eBay’s advertising through the active-passive lens, the court determined that offering user-provided goods for sale, setting terms of service, receiving remuneration for service, and providing general information to users are safe-harbored activities, but “optimising the presentation of . . . offers for sale . . . or promoting them” is not.⁶⁶

Scholars have criticized the court’s reasoning in *Google France* and *L’Oréal*, because it effectively guts the storage safe harbor for today’s most popular and useful public-facing online services.⁶⁷ Moreover, the CJEU’s narrow reading of ECD Article 14 is arguably rooted in a misapplication of an ECD recital intended to apply only to ECD Articles 12 and 13, which cover transmission and caching, respectively.⁶⁸ In the wake of these decisions, which apply the active-passive test to services claiming safe harbor under ECD Article 14, only the most access-restrictive and feature-poor cloud storage services can realistically qualify for protection.

The CJEU precedent more clearly applicable to a content-sharing service like YouTube is *SABAM v. Netlog*.⁶⁹ The defendant social media platform allowed users to upload and share video clips and other types of content, including photos and music.⁷⁰ SABAM sued, alleging that users had uploaded content that infringed copyrights in its music repertoire.⁷¹ Notably, SABAM didn’t dispute, and the court apparently saw no reason to question, Netlog’s eligibility for safe harbor under ECD Article 14.⁷² That legal conclusion was simply taken for granted by all involved.

65. *Id.* ¶ 113.

66. *Id.* ¶ 116.

67. See Case C-236/08, *Google Fr. v. Louis Vuitton Malletier*, 2009 E.C.R. 159; *L’Oréal SA*, 2010 E.C.R. 474; Sophie Stalla-Bourdillon, *Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well. . .*, in *THE RESPONSIBILITIES OF ONLINE SERVICE PROVIDERS* 286–88 (Mariarosaria Taddeo & Luciano Floridi eds., 2017) (arguing that the active-passive dichotomy for interpreting the scope of Article 14 more or less eviscerates the safe harbor because all services are to some extent “active” in their handling of users’ data).

68. RIORDAN, *supra* note 56, at 402 (“The neutrality requirement probably stems from a mistaken reading of recital (42) (which applies only to caching and transmission).”). See also *L’Oréal SA*, 2010 E.C.R. 474, ¶¶ 138–42 (expressing doubt that recital 42 applies to hosting providers).

69. C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85.

70. *Id.* ¶¶ 16–17.

71. *Id.* ¶¶ 18, 21.

72. *Id.* ¶ 27 (“[I]t is not in dispute that the owner of an online social networking platform . . . stores information provided by the users of that platform, relating to their profile, on

Is a different conclusion warranted for YouTube? Inasmuch as Netlog's users maintained their own profiles and were able to share music and video clips, Netlog had at least some functionality in common with YouTube. Because the court did not discuss Netlog's architecture in any detail, and because the service no longer exists, it is impossible to do a side-by-side comparison. *Netlog* does establish, however, that the Commission could have looked to CJEU authority other than the keyword advertising cases for guidance about the applicability of ECD Article 14 to a social media platform accused of infringing music copyrights. Instead, it chose two search-related trademark cases that took a very narrow view of ECD Article 14's scope. In doing so, the Commission put a thumb on the scale for rights holders.

2. InfoSoc Directive Article 3(1) in the CJEU

Existing copyright case law from the CJEU more clearly supports the Commission's broad reading of "communication to the public" under InfoSoc Directive Article 3(1). Article 3(1) requires member states to give authors "the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works."⁷³ The InfoSoc Directive does not define "communication to the public" but requires an interpretation that is consistent with the policy goal of strongly protecting authors and remunerating them for use of their works.⁷⁴

The case that is most closely on point is *Brein v. Ziggo*,⁷⁵ involving the Pirate Bay, the infamous search engine for peer-to-peer torrent files. The question presented was whether the Pirate Bay engaged in communication to the public by indexing and categorizing links to copyrighted works so that users could find and share them. In its analysis, the CJEU distinguished between activities that count as an "act of communication" and those that involve "the mere provision of services for enabling or making a communication."⁷⁶ To determine on which side of that line the Pirate Bay fell, the CJEU cited a rule developed in previously decided cases involving

its servers, and that it is thus a hosting service provider within the meaning of Article 14."). The live issue in the case, discussed below in Section III.B, was whether the preventive injunction SABAM sought under ECD Article 14 was too broad in light of ECD Article 15's prohibition on general monitoring obligations.

73. InfoSoc Directive, *supra* note 6, at 16 (art. 3(1)).

74. Case C-610/15, *Stichting Brein v. Ziggo*, 2017 E.C.R. 456, ¶¶ 21–22.

75. *Id.* ¶¶ 1–2.

76. *Id.* ¶¶ 3, 26.

hyperlinking: “[P]rovision . . . of clickable links to protected works published without any access restrictions on another site affords users of the first site direct access to those works” sufficient to establish an act of communication.⁷⁷

Despite recognizing that third parties provided all of the links on the Pirate Bay, the CJEU held that direct liability was appropriate.⁷⁸ By indexing third-party links to content that it knew to be infringing, and by making those links searchable, the Pirate Bay enabled users to share copyrighted files that they would otherwise either not be able to share or have difficulty sharing. In doing so, the court concluded, the Pirate Bay itself communicated those works within the meaning of InfoSoc Directive Article 3(1).⁷⁹

Moreover, the court held, the Pirate Bay went beyond “the mere provision of services” by classifying the available works under different subject matter categories, having employees check to make sure works were properly classified, deleting obsolete or corrupt torrent files, and filtering some content.⁸⁰ In the court’s analysis, the array of access-facilitating functionality that makes the Pirate Bay useful for finding shared third-party content also makes it liable for unauthorized communication to the public. The CJEU’s catalog of the ways in which the Pirate Bay exceeded the mere provision of services for purposes of Article 3(1) calls to mind its application of the active-passive test to Google and eBay in the ECD Article 14 cases.

3. The Commission’s Interpretations of ECD Article 14 and InfoSoc Directive Article 3(1)

By ratifying rights holder arguments concerning the narrow scope of ECD Article 14 and the broad scope of InfoSoc Directive Article 3(1), the Commission’s proposal for Article 13 answered unsettled legal questions about YouTube that are pending before the CJEU in *LF* and *Puls 4 TV*.⁸¹ As far as the Commission was concerned, to the extent that a provider makes UGC videos searchable (thereby “optimizing” them) and recommends them to other users (thereby “promoting” them), it is

77. *Id.* ¶ 32.

78. *Id.* ¶¶ 36, 50.

79. *Id.* ¶¶ 36–39.

80. *Id.* ¶ 38.

81. *See* Case C-682/18, *LF v. Google, LLC*, 2018 E.C.R. (referring to the CJEU questions about YouTube’s eligibility for the ECD Article 14 storage safe harbor and its liability for communication to the public under InfoSoc Directive Article 3(1)); Case C-500/19, *Puls 4 TV GmbH & Co. KG v. YouTube LLC*, 2019 E.C.R. (referring the same issues as those being litigated in *LF*).

too active to qualify for Article 14's storage safe harbor.⁸² And to the extent that a provider allows playback of UGC videos, it goes beyond "the mere provision of physical facilities"⁸³ and gives the public access to copyrighted works, thereby communicating them to the public within the meaning of InfoSoc Directive Article 3(1).

Implicitly, the Commission's proposal for Article 13 ticked all of the boxes on the music industry's "value gap" wish list: it expelled YouTube from ECD Article 14's storage safe harbor; it made YouTube liable under InfoSoc Directive Article 3(1) for unauthorized communication to the public; and it mandated that YouTube obtain licenses for all of the content it hosts, including all of the UGC that record labels and music publishers currently monetize through Content ID on terms the industry resents. The Commission's intended result was to close the value gap by tuning safe harbors in a way that would put YouTube in a weaker position from which to negotiate future licensing deals with major music industry stakeholders.

B. The (Technical) Measures Requirement

The Commission described the measures requirement in proposed Article 13 as necessary to "ensure the functioning of [licensing] agreements . . . or to prevent the availability" of copyrighted works on covered services.⁸⁴ The contemplated measures were technical ones, "such as the use of effective content recognition technologies."⁸⁵ The Commission's proposal was silent as to what systems might qualify, but the impact assessment for the DSM Directive contains an appendix (Annex 12) that is chock-full of relevant information, including a vendor list.⁸⁶

As discussed in Part II above, Content ID is the paradigmatic example of a content recognition (or filtering) system that can automatically claim content on behalf of a rights holder and either monetize or block it, as the rights holder specifies. As Article 13 required, Content ID can both ensure the functioning of licensing

82. See DSM Directive Proposal, *supra* note 43, at 20 (recital 38) (stating that for purposes of Article 14 "it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them").

83. See *id.* (stating that it is an act of communication to the public to "store and provide access to the public to copyright protected works").

84. *Id.* at 29 (art. 13).

85. *Id.*

86. See *Commission Impact Assessment on the Modernisation of EU Copyright Rules*, at 167–72, COM (2016) 593 final (Sept. 14, 2016), <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules> [<https://perma.cc/7KZA-UN25>] [hereinafter "Impact Assessment"].

agreements (i.e., by tracking views of claimed, monetized videos) and prevent the availability of unauthorized copyrighted works (i.e., by blocking videos that rights holders claim but choose not to monetize). Besides Google, the only other major player in the ACR-for-copyright-management market is Audible Magic, a US-based private firm.⁸⁷ YouTube initially licensed digital fingerprinting technology from Audible Magic, but Google ultimately decided to build its own proprietary system.⁸⁸ Confusingly, both firms now refer to their systems as Content ID.⁸⁹

Google doesn't license Content ID for third-party use, but Audible Magic markets ACR as a service to universities and social media platforms.⁹⁰ Its growing list of social media clients includes Facebook, Vimeo, Spinrilla, SoundCloud, DailyMotion, Twitch, and Tumblr.⁹¹ Seeing an extraordinary business opportunity, Audible Magic lobbied aggressively for mandatory content filters during the public consultation that preceded the Commission's proposal—and throughout the remainder of the DSM Directive policy-making process.⁹² On message with music industry trade associations, it submitted a slide deck to the Commission, explicitly positioning its technology as a solution to the value gap.⁹³ In 2017, it published a promotional video on

87. See *Company*, AUDIBLE MAGIC, <https://www.audiblemagic.com/company/> [<https://perma.cc/QY2M-UJ4Q>].

88. See Brief of Amicus Curiae Audible Magic Corporation in Support of Neither Party at 1–3, *Viacom Int'l v. YouTube*, 676 F.3d 19 (2d Cir. 2012) (No. 10-3270) (stating that YouTube was Audible Magic's customer for ACR technology beginning in 2007).

89. The two firms are embroiled in a dispute over trademark rights in the "Content ID" name. See *Audible Magic Pursues Trademark Case Against Google*, BUS. WIRE (Jan. 10, 2017), <https://www.businesswire.com/news/home/20170110006413/en/> [<https://perma.cc/73CX-EU6K>]. Audible Magic claims that it is the rightful owner of the trademark and has filed a petition with the US Patent and Trademark Office to cancel Google's federal registration of the mark. *Id.* The cancellation proceeding was pending when this Article went to press.

90. See Press Release, Audible Magic Corp., CopySense® Appliance 10G Automates DMCA Notice Reduction for Campus IT Networks (Feb. 3, 2015), <https://www.audiblemagic.com/2015/02/03/audible-magic-introduces-upgraded-dmca-tool-for-colleges-and-universities/> [<https://perma.cc/NY4L-M3Z2>] (listing available products and services).

91. See *Home*, AUDIBLE MAGIC, <https://www.audiblemagic.com/> [<https://perma.cc/5FTS-L2ZP>].

92. See *Annex 1 - Gestdem 2017/4050: List of Documents*, COM (2017) 4050 (Apr. 9, 2017), <https://www.asktheeu.org/en/request/4465/response/14429/attach/5/Annex%201%20Gestdem%202017%204050%20v3.pdf> [<https://perma.cc/RVH7-S8F9>] (collecting, in response to an open records request, communications relating to Audible Magic's services from Audible Magic to various European Commission and EU officials, including the Directorate-General for Communications Networks, Content and Technology).

93. *Id.* at 23.

Vimeo, touting its system as an easy, accurate, and affordable Article 13 compliance tool.⁹⁴

Recital 39 of the Commission’s proposal made it clear that the Commission intended “measures” in Article 13 to mean a content recognition and monetization system like Content ID.⁹⁵ The Commission contemplated that service providers would be accountable to rights holders with respect to their choice of technology and would be obliged to provide rights holders with performance statistics and analytics on an ongoing basis.⁹⁶ Rights holders’ sole obligation would be to give providers reference files—“necessary data” for content matching and automated claiming.⁹⁷ Under the Commission’s proposal, the expense of implementing and maintaining technical measures was to fall entirely on service providers—a stark departure from the ECD’s assignment of monitoring obligations to rights holders.

Article 13’s technical measures requirement was precisely what the music industry wanted. During the public consultation preceding the DSM Directive’s drafting, industry trade groups demanded that providers be required to deploy technical measures as a precondition for claiming safe harbor under ECD Article 14. For example, the British trade association UK Music—which represents record labels, music publishers, and concert promoters—filed comments referencing Content ID specifically:

The duty of care under the system provided in Articles 12–15 ECD needs to be clarified so that online platforms have to apply measures to bring to an end (and to prevent) further infringements. . . . A duty of care should include obligations to employ software to enable identification of copyright content. Solutions can be based on technology which is readily available such as the Content ID software programme.⁹⁸

The ECD does permit member states to impose duties of care on storage providers “in order to detect and prevent certain types of illegal

94. Audible Magic Corp., *Audible Magic Content ID for Compliance and Monetization in Europe*, VIMEO (Jan. 10, 2017), <https://vimeo.com/198929871> [<https://perma.cc/X7QM-V39T>].

95. See DSM Directive Proposal, *supra* note 43, at 20 (recital 39) (“Collaboration between information society service providers . . . and rightholders is essential for the functioning of . . . content recognition technologies.”).

96. See *id.* (“[T]he services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders’ content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.”).

97. See *id.* (stating that “rightholders should provide the necessary data to allow the services to identify their content”).

98. UK Music, *Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*, EUR. COMMISSION 7–8 (Dec. 21, 2015), http://ec.europa.eu/information_society/newsroom/image/document/2016-7/uk_music_14048.pdf [<https://perma.cc/QN57-8XGA>].

activities.”⁹⁹ Such duties are limited, though, by ECD Article 15. As discussed above in Part II, ECD Article 15 prohibits member states from conditioning safe harbor on a general monitoring obligation. At the same time, the ECD does allow member states to impose monitoring obligations “in a specific case.”¹⁰⁰

Article 13’s technical measures requirement was difficult to reconcile with ECD Article 15. Proponents argued that the required measures amounted only to permissible specific monitoring for a closed universe of works designated by rights holders. As described above, however, Content ID and Audible Magic both work by screening every piece of user-uploaded content in real time against an always-expanding universe of reference files. No file escapes the system’s surveillance. If such functionality does not amount to general monitoring, it is hard to imagine what would. The argument that ACR systems like Content ID perform only specific monitoring strains credulity in light of the fact that Audible Magic’s reference database already contains ten million files and is growing at the rate of three hundred thousand files per month.¹⁰¹ The Commission’s proposal altogether ignored the obvious tension between Article 13 and ECD Article 15.¹⁰²

The CJEU has addressed the legality of permanent filtering mandates in copyright cases involving judicial injunctions. In *Scarlet Extended v. SABAM*,¹⁰³ it held that ECD Article 15 prevents a court from ordering an internet access provider to continuously and permanently filter all traffic transiting its network for the purpose of preventing infringing peer-to-peer file sharing.¹⁰⁴ SABAM wanted Scarlet Extended and other defendants to block peer-to-peer file transfers in real time.¹⁰⁵ The defendants argued that such an order would be a de facto general monitoring obligation in violation of ECD Article 15, “inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through [their] network[s].”¹⁰⁶ In other

99. ECD, *supra* note 5, at 6 (recital 48).

100. *Id.* at 6 (recital 47).

101. See *Content Registration*, AUDIBLE MAGIC, <https://www.audiblemagic.com/content-registration> [<https://perma.cc/5RBV-MFZZ>].

102. Sophie Stalla-Bourdillon, *Open Letter to the European Commission*, MEDIUM (Dec. 8, 2016), <https://medium.com/eu-copyright-reform/open-letter-to-the-european-commission-6560c7b5cac0> [<https://perma.cc/JU7Y-FRJK>].

103. Case C-70/10, *Scarlet Extended SA v. SABAM*, 2011 E.C.R. I-11959.

104. *Id.* ¶¶ 53–54.

105. *Id.* ¶ 20.

106. *Id.* ¶ 25. Scarlet Extended also argued that the requirement would violate EU privacy law, because it required identification of the internet protocol addresses of file sharers. See *id.* ¶ 26.

words, in order to filter out any one type of data protocol from the network's total traffic flow, the provider would have to screen all data.¹⁰⁷

The CJEU agreed with *Scarlet Extended*, finding that “[p]reventive monitoring of this kind would . . . require active observation of all electronic communications . . . and, consequently, would encompass all information to be transmitted and all customers using th[e] network.”¹⁰⁸ In addition, the court held, requiring an ISP to continuously and indefinitely monitor all traffic for potential infringements at its own expense would not strike a fair balance—as required by Article 3(1) of the Enforcement Directive—between the plaintiff's intellectual property rights and the defendant's right to conduct business.¹⁰⁹

In *SABAM v. Netlog*,¹¹⁰ the CJEU interpreted ECD Article 15 as applied to a proposed filtering injunction against a social media platform. As discussed above in Section III.A, Netlog was protected by ECD Article 14's storage safe harbor. SABAM sought an injunction requiring Netlog to implement and permanently operate a filtering system “capable of identifying electronic files containing musical, cinematographic or audio-visual work[s] . . . with a view to preventing those works from being made available to the public.”¹¹¹ This is precisely what the Commission proposed for providers covered by Article 13, regardless of their eligibility for ECD Article 14's storage safe harbor.¹¹² Citing *Scarlet Extended*, the CJEU in *Netlog* held that such an injunction would violate ECD Article 15:

Preventive monitoring of this kind would thus require active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1).¹¹³

In light of *Scarlet Extended* and *Netlog*, any insistence that Article 13's measures requirement would not require general monitoring rings hollow. Services like Content ID, which the music industry demanded by name, work by monitoring all content from all users all the time. The CJEU has stated clearly that such monitoring

107. See *id.* ¶ 25.

108. *Id.* ¶ 39.

109. *Id.* ¶¶ 48–49.

110. Case C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85, ¶ 38.

111. *Id.* ¶ 26.

112. See DSM Directive Proposal, *supra* note 43, at 3.

113. *Netlog NV*, 2012 E.C.R. 85, ¶¶ 37–38.

amounts to “general monitoring.”¹¹⁴ As proposed, Article 13’s preventive measures requirement effectively repealed ECD Article 15 for ECD Article 14 storage providers.

IV. OBJECTIONS TO THE COMMISSION’S PROPOSAL

Criticism of proposed Article 13 focused on three main types of harms: harms to individuals’ expressive freedom, harms to online businesses, and harms to innovation and competition at the internet’s application layer.¹¹⁵ For a proposal designed to address a quite specific power imbalance in the music streaming market, Article 13 represented a substantial disruption of longstanding copyright policy, creating shockwaves for services beyond YouTube, content beyond music, and fundamental human rights beyond the protection of intellectual property.¹¹⁶

This Part surveys the primary objections to Article 13 from civil society groups, human rights advocates, and online businesses. In doing so, it exposes the risks of drafting generally applicable legislation to serve narrow sectoral interests.

A. Harms to Individual Users

The Charter of Fundamental Rights of the European Union (CFR) protects freedom of expression, including the freedom to receive and impart information.¹¹⁷ It also protects the right to intellectual property.¹¹⁸ In cases where fundamental rights collide, policy makers

114. Case C-70/10, *Scarlet v. SABAM*, 2011 E.C.R. I-11959, ¶ 40.

115. See, e.g., Danny O’Brien & Jeremy Malcolm, *70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal*, EFF BLOG (June 12, 2018), <https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal> [<https://perma.cc/YX7C-8X4P>] (describing and linking to a letter opposing Article 13 signed by Vint Cerf, Tim Berners-Lee, and other prominent technologists who built the early internet); David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), *Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, OL OTH 41/2018 (June 13, 2018), <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf> [<https://perma.cc/CP9M-B5FP>] (asserting Article 13’s incompatibility with Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)).

116. See Kaye, *supra* note 115.

117. See Charter of Fundamental Rights of the European Union 326/02, art. 11, 2012 O.J. (C 326) 391, 398 [hereinafter “CFR”].

118. *Id.* at 399 (art. 17).

and judges must attempt to balance them, aiming for proportionality when fashioning remedies.¹¹⁹

The CJEU recognized in *Scarlet Extended* and *Netlog* that content-filtering requirements implicate the expressive rights of internet users because ACR systems are unable to distinguish between lawful and unlawful content.¹²⁰ ACR systems are built on content-matching algorithms, which means they can recognize content in an upload that duplicates content in a reference file.¹²¹ Not all copying is legally actionable, however; there are limitations and exceptions to copyright that permit unauthorized copying in certain circumstances.¹²² Because copyright is not an absolute right to exclude all secondary uses, detecting a match between an upload and a reference file is only the first step in determining if there has been copyright infringement. Unfortunately, today's ACR systems can't go beyond that first step to analyze whether an uploader's duplicated content falls within an exception or limitation.¹²³ ACR systems are thus prone to false positives and resultant expressive harms.

Despite Audible Magic's confident claims about the accuracy of its system for detecting infringement, the shortcomings of ACR for copyright enforcement are well-documented. For example, Ben Depoorter and Robert Kirk Walker count enforcement automation among several sources of false positives that bedevil the copyright system and give creators of the past veto power over creators of the present.¹²⁴ Toni Lester and Dessimlava Pachamanova examine the problem of algorithmic false positives in the specific context of hip-hop music on YouTube, arguing that Content ID disproportionately hampers creativity in hip-hop because artists in that genre rely heavily on sampled loops and other *de minimis* borrowed elements.¹²⁵ From an expressive rights standpoint, ACR would be a less problematic enforcement tool if vendors could train algorithms to assess

119. Case C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85, ¶ 42.

120. *Id.* ¶ 50; Case C-70/10, *Scarlet Extended v. SABAM*, 2011 E.C.R. I-11959, ¶ 52, <https://h2o.law.harvard.edu/collages/26395> [<https://perma.cc/4XTH-RTHW>].

121. Engstrom & Feamster, *supra* note 23, at 18.

122. Exceptions and limitations are not harmonized at the EU level; rather, they are permissive for member states. See InfoSoc Directive, *supra* note 6, at 16–17 (art. 5).

123. See Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 290 (2019) (observing that context-specific factors that should be accounted for in fair use determinations are not considered in algorithmic policing systems).

124. Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 332–36 (2013).

125. Toni Lester & Dessimlava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51, 53 (2017).

context-dependent secondary uses of copyrighted material.¹²⁶ Although machine-learning technology is advancing, it isn't there yet.¹²⁷

ACR systems are also unable to detect unwarranted claims on public domain material that arise from mistaken or fraudulent submission to vendors of reference files containing such material. When it comes to a provider like Audible Magic that ingests hundreds of thousands of new reference files every month, questions loom large concerning proper verification of copyright ownership and safeguards against overclaiming. Some notorious examples of public domain material wrongly claimed by rights holders through YouTube's Content ID system are white noise,¹²⁸ bird songs,¹²⁹ NASA mission footage,¹³⁰ and Beethoven's Fifth Symphony.¹³¹

In assessing the draft DSM Directive's net impact on fundamental rights guaranteed by the CFR, the Commission concluded that the directive as a whole would "have a positive impact on copyright as a property right" and only a "limited impact on the . . . freedom of expression and information . . . due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders."¹³² The Commission's proposal did not, however, address the known limitations of ACR technology or the impact of those limitations on the expressive rights of users attempting to share third-party content lawfully but without authorization.

B. Harms to Online Businesses

The CFR also recognizes the right to conduct a business as a fundamental right.¹³³ To the extent that statutory licensing and

126. See generally Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1082, 1094–99 (2017) (considering the challenges and potential of automating fair use analysis with machine learning and artificial intelligence).

127. See Burk, *supra* note 123.

128. Chris Baraniuk, *White Noise Video on YouTube Hit by Five Copyright Claims*, BBC (Jan. 5, 2018), <https://www.bbc.com/news/technology-42580523> [<https://perma.cc/5WRE-UZCR>].

129. Mike Masnick, *Guy Gets Bogus YouTube Copyright Claim. . . On Birds Singing in the Background*, TECHDIRT (Feb. 27, 2012), <https://www.techdirt.com/articles/20120227/00152917884/guy-gets-bogus-youtube-copyright-claim-birds-singing-background.shtml> [<https://perma.cc/BJL6-7K36>].

130. Timothy B. Lee, *How YouTube Lets Content Companies "Claim" NASA Mars Videos*, ARS TECHNICA (Aug. 8, 2012), <https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/> [<https://perma.cc/39F2-6TDY>].

131. Ulrich Kaiser, *Google: Sorry Professor, Old Beethoven Recordings on YouTube Are Copyrighted*, ARS TECHNICA (Sept. 3, 2018), <https://arstechnica.com/tech-policy/2018/09/how-contentid-knocked-down-decades-old-recordings-of-beethoven/> [<https://perma.cc/6VD4-KWUE>].

132. DSM Directive Proposal, *supra* note 43, at 9.

133. CFR, *supra* note 117, at 399 (art. 16).

filtering obligations impose costs and burdens on the businesses to which they apply, Article 13 impacted the right to conduct a business. The question is whether the Commission got the right balance between the interests of rights holders and the interests of online businesses subject to Article 13's proposed monitoring obligation.

A coalition of 240 EU-based online businesses thought the Commission got it wrong. Their CEOs signed an open letter urging members of European Parliament (MEPs) to reject Article 13 as proposed.¹³⁴ The letter cited the financial and operational burdens of implementing filtering systems, the inaccuracy of available technology, and the lack of protection in Article 13 for small- and medium-sized enterprises.¹³⁵ The draft DSM Directive, they wrote, "fail[s] to strike a fair balance between creators and all other parts of society."¹³⁶

In *Netlog*, the CJEU considered harm to the defendant service provider's business interests when it considered whether the challenged filtering injunction reflected a fair balance between the parties' competing rights.¹³⁷ The court held that a permanent, service-wide filtering injunction was not justifiable.¹³⁸ To reach that conclusion, it surveyed what the injunction required Netlog to do: install a filtering system to monitor all or most of the content it hosted, monitor user uploads without any time limitation, and monitor not only for existing works but for works to be created in the future.¹³⁹ In its analysis, the court cited both the CFR and the Enforcement Directive¹⁴⁰:

[S]uch an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a *complicated, costly, permanent* computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly.¹⁴¹

"Complicated," "costly," and "permanent" is a trio of adjectives that also applies to the technical measures the Commission mandated in its Article 13 proposal.

134. Jos Poortvliet, *240 EU Businesses Sign Open Letter Against Copyright Directive Art. 11 & 13*, NEXTCLOUD (Mar. 19, 2019), <https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13/> [<https://perma.cc/P2MV-PXZ6>] (reposting an open letter from CEOs to members of the European Parliament).

135. *Id.*

136. *Id.*

137. See Case C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85, ¶¶ 43–47 (holding that the injunction did not strike a fair balance).

138. *Id.* ¶ 52.

139. *Id.* ¶ 45.

140. Directive 2004/48, 2004 O.J. (L 157/45) (EC).

141. *Id.* ¶ 46 (emphasis added).

For whatever reason, the Commission appears to have ignored *Netlog* and *Scarlet Extended* in its assessment of Article 13's impact on the right of online service providers to conduct business. The Commission believed that the filtering requirement was unproblematic because "it only applie[d] to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users."¹⁴² Such services, presumably, could afford to pay the freight. But what counts as "large amounts"? Every UGC service operating at internet scale hosts what one might reasonably describe as large amounts of copyright-protected content. For a policy intended to target YouTube specifically, DSM Directive Article 13 caused widespread alarm within the European Union's growing online business sector.

C. Harms to Innovation and Competition

Among the concerns the EU internet businesses raised in their open letter to MEPs was that Article 13 as proposed would harm innovation and competition by imposing costs and burdens that small enterprises are not in a position to bear.¹⁴³ By creating barriers to entry for new services that might compete with—or even displace—today's giants, cost-intensive regulations enacted to discipline those giants could operate counterproductively to further entrench them. Lacking a carve-out of any kind for small- and medium-sized businesses, Article 13 threatened to chill investment in new EU-based content-sharing services and to raise operating costs for existing ones.

The expense of operating a filtering system involves both technological and human resources. The necessary technological resources are in the form of software and hardware. The necessary human resources are in the form of ongoing customer support—for both rights holders and users. Rights holders continuously submit new reference files for inclusion in ACR databases. To prevent mistake and fraud, each assertion of copyright ownership in a reference file must be verified. Users, for their part, continuously appeal mistaken and abusive automated claims. Those appeals must ultimately be decided by humans, given the technological limits of ACR systems. Under Article 13, all compliance costs were allocated to service providers.

The big players can afford the cost of mandatory technical measures. YouTube long ago absorbed the cost of developing Content

142. DSM Directive Proposal, *supra* note 43, at 9.

143. See Poortvliet, *supra* note 134 ("European companies like ours will be hindered in their ability to compete or will have to abandon certain markets completely.").

ID, which it put at \$60 million in 2014.¹⁴⁴ Including ongoing operational costs, YouTube has spent a total of \$100 million on the system.¹⁴⁵ And, as mentioned above in Section III.B, most of the internet's largest and most popular content-sharing services already voluntarily license ACR technology from Audible Magic. The cost of those licenses is undisclosed, and it is unclear what additional human-resource costs those services incur in connection with licensed services.

Startups and smaller providers, by contrast, have not already built or licensed ACR systems.¹⁴⁶ They haven't already hired—and likely couldn't pay—staff to manage the related customer-support issues. Whatever costs of compliance are associated with the DSM Directive will be new to them. To the extent that those costs prevent small and new providers from operating profitably, those providers will cease to exist, further concentrating power in the internet's giants.¹⁴⁷

Another competition-related issue arising from Article 13 is the lack of competition in the market for ACR technology that offers permission-management for user-uploaded copyrighted content.¹⁴⁸ As stated above in Section III.B, Google does not license Content ID to third parties, which makes Audible Magic the only obvious alternative. New entrants to the ACR market could provide competition, but they will need to steer clear of Audible Magic's portfolio of patents covering ACR and fingerprinting technology.¹⁴⁹

144. See Katherine Oyama, *Why the Digital Millennium Copyright Act Is Working Just Fine...*, DIGITAL MUSIC NEWS (Apr. 10, 2014), <https://www.digitalmusicnews.com/2014/04/10/dmca-working-just-fine/> [<https://perma.cc/53UK-WEND>] (stating the cost of developing Content ID).

145. Google, Inc., *supra* note 27, at 27.

146. See Poortvliet, *supra* note 134 (“Most companies are neither equipped nor capable of implementing the automatic content filtering mechanisms [Article 13] requires, which are expensive and prone to error.”).

147. See *id.* (“Although the purpose of these regulations is to limit the powers of big US Internet companies like Google or Facebook, the proposed legislation would end up having the opposite effect. Article 13 requires filtering of massive amounts of data, requiring technology only the Internet giants have the resources to build.”).

148. There are several other providers who offer ACR technology for related use cases—some involving cross-device marketing and audience analytics, others geared to image recognition. See Impact Assessment, *supra* note 87 (“The aim of the table is to give an indicative and non-exhaustive list of available services covering different content and different features, based on publicly available information. It is not to be read as a comparison of services and their prices.”).

149. See *Patents*, AUDIBLE MAGIC, <https://www.audiblemagic.com/patents/> [<https://perma.cc/U43A-GV5J>] (describing patents in the areas of “[d]igital fingerprint-based media detection technology,” “[i]dentification of content as it flows across networks,” and “[a]pproaches to caching and indexing a reference database to improve the performance of the system”).

An additional hurdle for new entrants in the ACR market is access to reference files. With its current store of over ten million reference files, Audible Magic has already scaled and won the trust of the world's largest corporate rights holders, giving it a considerable first-mover advantage. In order to minimize legal exposure, content-sharing services subject to a technical measures mandate will logically choose an ACR vendor with an established reputation and a vast database of reference files. Right now, Audible Magic is the market leader, touting its Copyright Compliance Service as “the industry standard,” which “the biggest names in music . . . most often recommend.”¹⁵⁰

V. ARTICLE 17: FROM DE JURE TO DE FACTO TECHNICAL MEASURES

As a result of intense public opposition,¹⁵¹ the EU Parliament made several changes to Article 13 before approving it as Article 17 of the DSM Directive. This Part summarizes those changes and evaluates how effectively they answer the criticisms discussed in Part IV.

A. A Narrower Range of Covered Providers

The adopted version of DSM Directive Article 17 ostensibly targets a narrower range of providers than Article 13 did. It abandons use of the term “information society service providers”—a holdover from the ECD—in favor of a new term of art: “online content-sharing service provider” (OCSSP).¹⁵² Recital 62 of Article 17 goes to great lengths to qualify the definition of OCSSP in a way that appears to zero in on YouTube and its ad-supported, engagement-driven business model.¹⁵³

150. *Copyright Compliance Service*, AUDIBLE MAGIC, <https://www.audiblemagic.com/compliance-service/> [<https://perma.cc/7ZWF-EC8B>].

151. *See, e.g.*, Jason Tashea, *Proposed EU Regulation to Modernize Copyright Laws Generates Controversy, Heated Opposition*, ABA J. (Mar. 18, 2019), <http://www.abajournal.com/web/article/proposed-eu-regulation-to-modernize-copyright-laws-generates-controversy-and-heated-opposition> [<https://perma.cc/G42V-YPA3>] (reporting on significant public opposition to Article 13).

152. *See* DSM Directive, *supra* note 1, at 119 (art. 17) (governing “use of protected content by online content-sharing service providers”).

153. *See id.* at 106 (recital 62) (“The definition . . . should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.”).

Recital 62 further stipulates that a provider's status as an OCSSP must be determined on a case-by-case basis, taking into account a combination of elements, including number of users and number of files hosted.¹⁵⁴ Requiring case-by-case adjudication is presumably a way to avoid implicating noncommercial and less dominant providers. But case-by-case adjudication comes at the cost of certainty for businesses that cannot determine from the face of the DSM Directive whether it applies to them.

Further narrowing the scope of Article 17's coverage, Recital 62 lists several specific types of providers that should *not* be deemed OCSSPs, including business-to-business cloud service providers, cyberlockers, open-source software repositories, not-for-profit scientific or educational repositories, and not-for-profit online encyclopedias.¹⁵⁵ These explicit exclusions address the concern that draft Article 13's very broad definition of covered services would have captured a wide swath of providers historically protected by ECD Article 14 and remote from the music industry's quarrel with YouTube.

The caveat with recitals, however, is that they may be used in aid of interpretation but they are not operative law. Therefore, it will ultimately be for the CJEU to decide in litigation which providers fall under the definition of OCSSP. In the meantime, the scope of the definition will remain indeterminate. Even providers that are expressly excluded in Recital 62 will have to grapple with a degree of uncertainty.

B. The Licensing Requirement

The licensing requirement in the Commission's original proposal applied only to providers ineligible for the ECD Article 14 safe harbor—a determination requiring adjudication under existing CJEU precedents, including *Google France*, *L'Oréal*, and *Netlog*. As adopted, DSM Directive Article 17 obviates the need to adjudicate a provider's safe harbor eligibility by stating flatly that OCSSPs cannot qualify for safe harbor under ECD Article 14.¹⁵⁶ Article 17 also states flatly that OCSSPs engage in communication to the public under InfoSoc Directive Article 3(1).¹⁵⁷

154. *Id.* at 106 (recital 63).

155. *Id.* at 106 (recital 62).

156. *Id.* at 119 (art. 17, ¶ 3) (“When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.”).

157. *Id.* at 119 (art. 17, ¶ 1) (“Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to

DSM Directive Article 17 thus establishes beyond peradventure, without any need for judicial analysis, that a provider operating as an OCSSP must license all copyright-protected content appearing on its service.¹⁵⁸ If the provider fails to do so, it faces liability for direct infringement. By laying to rest questions about proposed Article 13's interaction with existing provisions of the ECD and the InfoSoc Directive, Parliament handed the music industry the clear-cut licensing mandate it wanted and thereby removed its business dealings with YouTube from the shadow of the ECD's safe harbor.

C. The Best Efforts Requirement

With respect to an OCSSP's obligation to prevent the availability of unlicensed content on its service, DSM Directive Article 17 and its corresponding recitals omit Article 13's references to technical measures. Instead, Article 17 requires "best efforts" by OCSSPs to prevent the appearance of unauthorized copyrighted material in UGC.¹⁵⁹ What Article 17 doesn't say, and what the DSM Directive's recitals don't admit, is that the preventive measures demanded in the adopted text cannot realistically be achieved at scale without an ACR system like Content ID.

Whereas the proposal for Article 13 unabashedly embraced upload filters, DSM Directive Article 17—revised in response to the criticisms discussed above in Part IV—seems to have been drafted for plausible deniability on the filtering question. Instead of "effective content recognition technologies,"¹⁶⁰ it refers coyly to "high industry standards of professional diligence . . . to ensure the unavailability of specific works for which the rightholders have provided the . . . relevant and necessary information."¹⁶¹ In place of "deployed technologies,"¹⁶² it requires unspecified "suitable and effective means."¹⁶³

Through the best efforts requirement, Article 17 displaces the ECD's reactive notice-and-takedown model in favor of a

the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.").

158. *See id.* at 120 (art. 17, ¶ 1) ("An online content-sharing service provider shall therefore obtain an authorisation from the rightholders . . . for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.").

159. *Id.* (art. 17, ¶ 4(a)).

160. DSM Directive Proposal, *supra* note 43, at 29 (art. 13, ¶ 1).

161. DSM Directive, *supra* note 1, at 120 (art. 17, ¶ 4(b)).

162. DSM Directive Proposal, *supra* note 43, at 20 (recital 39).

163. DSM Directive, *supra* note 1, at 120 (art. 17, ¶ 5(b)).

notice-and-staydown model for OCSSPs.¹⁶⁴ An OCSSP can avoid liability for hosting inadvertently unlicensed third-party content by promptly removing the claimed content upon receipt of notice from the aggrieved rights holder.¹⁶⁵ Once the OCSSP has received notice concerning a particular piece of content, it must use “best efforts to prevent further uploads of the notified works and other subject matter for which the rights holders have provided relevant and necessary information.”¹⁶⁶ Translated into the language of ACR, which DSM Directive Article 17 pointedly avoids, “relevant and necessary information” means digital reference files. The OCSSP is tacitly charged with obtaining or creating a reference file for any content that is the subject of a notice, and then screening all subsequent uploads to prevent that content from reappearing.¹⁶⁷ The best efforts requirement is inarguably a de facto technical measures requirement.

To determine whether a provider has satisfied the best efforts requirement, Article 17 lists factors to be taken into account, including the type, audience, and size of the service and the type of content the service hosts.¹⁶⁸ Other relevant factors include “the availability of suitable and effective means and their cost.”¹⁶⁹ The inclusion of the last two factors is responsive to concerns discussed above in Sections IV.B and IV.C about compliance costs for providers and the highly concentrated market for ACR technology. The array of different factors to be considered when assessing the adequacy of a provider’s best efforts avoids the inflexibility of rigid mandates but, like the vague definition of OCSSP, undermines regulatory certainty for businesses.

One aspect of DSM Directive Article 17 that will be difficult for member states to square with the de facto technical measures requirement is a late-added prohibition on a general monitoring obligation—a prohibition reminiscent of ECD Article 15. The text of DSM Directive Article 17 tries to finesse the monitoring question by limiting the best efforts staydown obligation to “specific works”¹⁷⁰ that rights holders identify. As the CJEU recognized in *Netlog*, however, algorithmically blocking specific content inevitably requires monitoring

164. Cf. Husovec, *supra* note 18, at 61–64 (discussing notice-and-staydown as a policy choice).

165. DSM Directive, *supra* note 1, at 120 (art. 17, ¶ 4(c)).

166. *Id.* (art. 17, ¶ 6).

167. *Id.* (art. 17, ¶ 4(c)).

168. *Id.* (art. 17, ¶ 5(a)).

169. *Id.* (art. 17, ¶ 5(b)).

170. *Id.* (art. 17, ¶ 4(b)).

all content, which looks like general monitoring under any natural definition of “general.”¹⁷¹

To the extent that a staydown mandate requires ACR technology, and ACR technology works by monitoring all user uploads, there is no practical way to implement Article 17’s staydown mandate without also requiring general monitoring. In this sense, Article 17 contains conflicting requirements that will be difficult for member states to implement coherently.¹⁷²

D. Limited Relief for New Businesses

In response to concerns about the business and competitive harms associated with Article 13’s proposed requirements, DSM Directive Article 17 contains a very narrow exception for new OCSSPs. To qualify, a business must be less than three years old and have annual turnover of less than €10 million.¹⁷³ Businesses that meet those conditions must still make best efforts to obtain licenses, but they are subject only to a notice-and-takedown (versus a notice-and-staydown) mandate for preventing the appearance of unlicensed content.¹⁷⁴ A notice-and-staydown mandate kicks in immediately, however, if an otherwise qualified service exceeds an average of five million unique monthly users over the previous calendar year.¹⁷⁵

A critical question is whether this exception is too narrow to be meaningful. Is the apparently arbitrary allowance of three years of limited liability and lighter obligations enough to allow a new OCSSP to gain a foothold? Given how rapidly new services can scale, is five million unique monthly users too low a threshold to trigger

171. See Case C-360/10, *SABAM v. Netlog NV*, 2012 E.C.R. 85, ¶¶ 37–38.

172. An October 2019 ruling from the CJEU, *Glawischnig-Piesczek v. Facebook Ireland*, offers a quite generous interpretation of the permissible scope of “specific” monitoring under ECD Article 15. The plaintiff sued Facebook, seeking an injunction requiring Facebook to permanently block all posts identical or equivalent to a specific post containing defamatory statements about her. The Austrian national court referred the case to the CJEU to determine whether such an injunction would run afoul of Article 15’s prohibition on general monitoring obligations. The CJEU held that a national court may issue an injunction requiring a storage service provider to remove specific prohibited content and to prevent reuploads of the same or equivalent content. Such “specific” monitoring, the court said, does not violate Article 15 as long as the court’s order is sufficiently specific as to the equivalent content to be removed and does not require the service provider to “carry out an independent assessment” that could not be accomplished using “automated search tools and technologies.” See Case C-18/18, *Glawischnig-Piesczek v. Facebook Ireland*, 2019 E.C.R. 821, ¶¶ 34–45. This result seems impossible to reconcile with the CJEU’s earlier reasoning in *Netlog* and *Scarlet Extended* about what counts as general monitoring.

173. DSM Directive, *supra* note 1, at 120 (art. 17, ¶ 6).

174. *Id.*

175. *Id.*

disqualification for companies less than three years old? As a point of reference, it took YouTube less than two years to exceed *seventy* million unique monthly users.¹⁷⁶ Only time will tell whether the very limited new business exception that Article 17 provides can actually help EU startups disrupt, compete with, or dislodge dominant players like YouTube and Facebook.

E. Speech-Protective Provisions

As adopted, DSM Directive Article 17 contains provisions intended to address the free speech challenges associated with automated enforcement. It provides that preventive measures “shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright.”¹⁷⁷ For the benefit of OCSSP users, member states are required to protect certain secondary uses of copyrighted material: quotation, criticism, review, caricature, parody, and pastiche.¹⁷⁸

The problem with Article 17’s speech-protective provisions is that they will be quite difficult to implement in practice, given the technical limitations of today’s ACR systems. To address the fact that such systems are incapable of identifying public domain content or applying context-dependent limitations and exceptions, Article 17 requires that OCSSPs implement complaint and redress mechanisms for users who believe their content has been wrongly blocked or removed.¹⁷⁹ YouTube’s Content ID system does incorporate an appeal process, but users have criticized it for, among other things, taking too long.¹⁸⁰ Audible Magic’s service does not incorporate complaint and redress mechanisms at all, which means that OCSSPs outsourcing compliance to Audible Magic will be responsible for either designing and implementing user protections in-house or outsourcing that function to yet another provider for yet another fee. Either way, the cost

176. See *Google Buys YouTube for \$1.65bn*, BBC NEWS (Oct. 10, 2006), <http://news.bbc.co.uk/2/hi/business/6034577.stm> [<https://perma.cc/4CEB-5MJ6>] (“YouTube, launched in February 2005, has grown quickly into one of the most popular websites on the internet. It has 100 million videos viewed every day and an estimated 72 million individual visitors each month.”).

177. DSM Directive, *supra* note 1, at 120 (art. 17, ¶ 7).

178. *Id.*

179. *Id.* (art. 17, ¶ 9).

180. See, e.g., Shoshana Wodinsky, *YouTube’s Copyright Strikes Have Become a Tool for Extortion*, VERGE (Feb. 11, 2019), <https://www.theverge.com/2019/2/11/18220032/youtube-copystrike-blackmail-three-strikes-copyright-violation> [<https://perma.cc/B84E-73MN>] (reporting that the appeal process can take at least a month, during which time the complainant is barred from uploading any new content).

of that function is likely to be significant, because appeals under Article 17 require human review.¹⁸¹

VI. CONCLUSION

With the adoption of Article 17 of the DSM Directive, the CJEU's eventual decisions in *LF* and *Puls 4 TV* no longer matter. By the time the cases are decided, the court's analysis of ECD Article 14 and InfoSoc Directive Article 3(1) as applied to YouTube will be moot. In the interest of closing the "value gap," policy makers in Brussels assigned themselves the task of "clarifying" how existing EU law should apply to YouTube's business model. They did so by defining a new type of online intermediary subject to new—and unforgiving—liability rules.

Under Article 17, an OCSSP is by definition liable to rights holders under InfoSoc Directive Article 3(1) for any infringing UGC it hosts and ineligible for safe harbor under ECD Article 14. As a result, OCSSPs must take prescribed steps to avoid the liability their business model entails. First, they must attempt to conclude licensing agreements with all interested rights holders, so that all content uploaded by users is preauthorized. Then, they must use best efforts to ensure that no unlicensed copyrighted content is available to users. Once notified of such content, they have an ongoing obligation to prevent future uploads.

Granting the music industry's wish for narrowed safe harbors that exclude YouTube, Article 17 converts the ECD's longstanding notice-and-takedown regime into a notice-and-staydown regime. Article 17 avoids mentioning upload filters or technical measures, but the best efforts provision constructively requires OCSSPs to implement ACR systems capable of blocking any claimed content a rights holder declines to license. Modifying the Commission's original proposal, which contained no speech-protective provisions, Article 17 requires OCSSPs to honor copyright exceptions and limitations when exercising best efforts—a very tall order given the known limitations of existing ACR technology.

In Content ID, YouTube has a prebuilt compliance infrastructure for Article 17. That's because Article 17 was designed for Content ID and not vice versa. From the drawing board, the Commission's admitted policy goal was to adjust copyright liability rules to redistribute wealth from YouTube to music industry stakeholders. Whether Article 17 will actually accomplish that goal is

181. DSM Directive, *supra* note 1, at 109 (recital 70) ("Any complaint filed . . . should be processed without undue delay and be subject to human review.").

an open question. Against the music industry's potential benefits, we must weigh potential losses to other stakeholders in the digital economy. For new content-sharing services hoping to coexist and compete with rich incumbents like YouTube, Article 17 changes the rules of the game by increasing liability and raising operating costs. For internet users and independent creators, it changes the rules of the game by subjecting creative production to brittle and pervasive algorithmic enforcement. The only stakeholders that look like sure winners in the Article 17 sweepstakes are ACR providers like Audible Magic, for whom the EU Parliament just did a monumental favor.